

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of

Reexamination of the Comparative Standard
for Noncommercial Educational Applicants

Association of America's Public Television
Stations' Motion for Stay of Low Power
Television Auction (No. 81)

To: The Commission

MM Docket No. 95-31

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JUN 16 2003

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

PETITION FOR RECONSIDERATION OF THE
CURATORS OF THE UNIVERSITY OF MISSOURI

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SUMMARY

The Curators of the University of Missouri (the “University”) respectfully request reconsideration and clarification of the Second Report and Order in Reexamination of the Comparative Standard for Noncommercial Educational Applicants, MM Docket 95-31 (“*Second R&O*”). The Commission’s decision is contrary to the public interest, lacks empirical support, and fails to address the issues of interim licensing and the licensing of stations formerly licensed to Michael Rice.

Although the *Second R&O* claims to “preserve opportunities” for NCE applicants for non-reserved spectrum, as the University demonstrates, these opportunities are merely a mirage. The mitigating factors proffered by the Commission in fact provide no protection for NCE broadcasters. Thus, in reality, the *Second R&O* bans NCE stations from non-reserved spectrum as effectively as an outright prohibition. Barring NCE applicants from non-reserved spectrum contravenes the public interest. The public interest would be far better served by allowing NCE broadcasters like the University to compete with commercial broadcasters like Clear Channel Communications for non-reserved stations.

The Commission must also clarify the *Second R&O* with regard to interim licensing. Historically, the Commission has treated interim licensing as distinct from permanent licensing. The University asserts that the Commission should continue to do so and not dismiss NCE applications for interim licenses that are mutually exclusive with commercial applications. Noncommercial educational entities are particularly attractive candidates for interim licenses and the Commission should not dismiss these applicants based solely on their non-commercial status.

Finally, the Commission must recognize that the unique circumstances involved in licensing the former Michael Rice stations merits consideration. The long delay in service to the

public in communities once served by stations associated with Michael Rice mandates a *sui generis* approach.

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PETITION FOR RECONSIDERATION

The Curators of the University of Missouri ("the University"), by and through their attorneys, and pursuant to Section 1.429 of the Commission's Rules, hereby seek reconsideration of the Commission's *Second Report and Order*, released in the above-captioned proceeding on April 10, 2003, FCC 03-44, 68 Fed. Reg. 26,220 (May 15, 2003) ("*Second R&O*"). The University is an applicant for interim authority to operate the former KFMZ(FM), 98.3 MHz (Channel 252C2), Columbia, Missouri (File No. BIPH-20010724ACJ) (the "former Rice station" or "KFMZ") as a noncommercial educational ("NCE") station. As the *Second R&O* failed to address several important issues raised by the University and effectively bars NCE broadcasters from non-reserved spectrum, the Commission's decision must be reconsidered.

The policy that the *Second R&O* adopts—to summarily reject applications for NCE stations for non-reserved spectrum, where such applications conflict with one or more commercial applications¹—arbitrarily stifles the development of NCE broadcasting, in favor of

¹ *Second R&O* at ¶ 21.

commercial broadcasting. If the Commission's *Second R&O* is implemented in its present form, any expansion of NCE broadcasting would be severely circumscribed, and, therefore, demand for additional NCE programming would remain unmet.

Noncommercial Educational Service has traditionally been recognized and appreciated for its role in serving the public interest. Today, when media has become increasingly commercialized, NCE stations add tremendous value to broadcasting. Many areas continue to be underserved in NCE programming, in large part because only a small portion of the FM spectrum is reserved for such programming. Indeed, in many parts of the country, the spectrum reserved for NCE broadcasting is already full, and without the ability to expand to other portions of the spectrum, the full potential of NCE broadcasting will not be realized. At a minimum, applicants for NCE stations in the non-reserved spectrum should at least have an opportunity to compete with commercial applicants, and this the Commission denies in its *Second Report and Order*.

In 1997, Congress recognized the public interest in NCE broadcasting by exempting applicants for NCE stations from required auctions for FCC licenses and construction permits.² This legislation illustrates the intent of Congress to *ease* burdens on applications for NCE broadcasting. For a regulatory body to respond by *heightening* the burden on NCE applications, by virtually excluding them altogether from consideration for the non-reserved spectrum, contravenes congressional intent and ill-serves public policy.

The University has immediate concerns that the rule announced in the *Second R&O* will adversely affect its application for interim authority to operate the former Rice station. The

² For a description of the relevant part of the legislation, see *id.* at ¶ 4. The Court of Appeals for the District of Columbia, in interpreting the statute, ruled that the FCC must exempt applicants for NCE stations from all auctions. *National Public Radio v. FCC*, 254 F.3d 226, 228-29 (D.C. Cir. 2001).

process of replacing the former owner, Michael Rice's organization, has been ongoing now for almost two years; the Columbia community has been deprived of any service on the KFMZ frequency since October 3, 2001.³ Although the *Second R&O* should have no effect on the selection of an interim operator as it fails to address such grants of temporary authority, the University is concerned that it will be excluded from consideration to be the interim operator of the former Rice station. Therefore, the Commission should not effectively eliminate NCEs from consideration as an interim or permanent replacement for the former Rice station.

1. THE *SECOND R&O* EFFECTIVELY BARS NEW NCE STATIONS FROM NON-RESERVED SPECTRUM

In the *Second R&O*, the Commission offered the following three reasons why its decision is not "tantamount to an outright prohibition on applications for NCE stations for non-reserved spectrum:" (1) the "not uncommon" non-mutual exclusivity of applications for certain services; (2) the existence of settlement opportunities; and (3) the opportunity for applicants for NCE stations to reserve channels for NCE use according to revised procedures.⁴ Contrary to the Commission's gloss, these three factors provide virtually no protection to NCE applicants, and its decision effectively bars NCE applicants from non-reserved spectrum. In light of the Commission's stated goal "to preserve opportunities for applicants for NCE broadcast stations to use non-reserved spectrum,"⁵ the fact that its actions do not advance this goal warrants reconsideration.

In support of the proposition that it is "not uncommon" for applications for certain services not to be mutually exclusive, the Commission notes that in a recent proceeding more

³ See *Michael S. Rice*, 16 FCC Rcd 18394 (2001).

⁴ *Second R&O* at ¶ 23.

⁵ *Id.* at ¶ 21.

than one-third of 4700 applications for LPTV and TV translators were processed without requiring an auction.⁶ In other words, in that particular proceeding, one-third of the applications either faced no competition from the beginning or a settlement was reached with a previously conflicting applicant. As an initial matter, 33% is a distinct minority. Furthermore, this statistic lacks persuasiveness because it deals with only certain services—LPTV and TV translators—and covers only a limited period of time, one filing window. The nature and economics of low power television stations and TV translators are inherently distinct from full power TV and FM stations. Most importantly, the one-third statistic is misleading because it combines two different ways in which an auction can be avoided: non-mutual exclusivity in the first instance and settlements that resolved originally competing applications. By including the Commission's second justification, the opportunity for settlement, this statistic does not reveal the number of applications that faced no competition in the first instance.

In reality, the only scenario in which an NCE applicant could apply for non-reserved spectrum is where no competing commercial application is filed. NCE applicants, however, will find little comfort or relief in this. The high demand for TV and FM licenses renders it extremely unlikely that no commercial applicant would be interested in a given channel. Indeed, the Commission offers no statistic to refute this. On reconsideration, the Commission must acknowledge that the highly unlikely possibility that an NCE application will not be mutually exclusive in no way mitigates the impact of the *Second R&O* on NCE applicants.

Secondly, the Commission proffers that NCE applicants may settle with commercial applicants, and, therefore, it reasons that NCE applicants are not effectively excluded from securing non-reserved spectrum. This justification is exceedingly problematic, because, in light

⁶ *Id.* at ¶ 21.

of the Commission's proposed rule, there is no incentive for any commercial applicant to make any concessions to an NCE applicant, because the commercial applicant knows that the NCE application will be dismissed. In other words, because the NCE applicant enters any settlement negotiation with no bargaining leverage, it simply cannot achieve settlement. The Commission candidly acknowledged this difficulty in its *Second Further Notice of Proposed Rulemaking* (the "*Second NPRM*"), 67 Fed. Reg. 9945 (Feb. 14, 2002), in which it noted that "[u]nder this approach . . . there would be little incentive for the commercial applicant to try to settle or reach an engineering solution in the first place."⁷ Furthermore, settlements are only permitted in extremely limited circumstances.⁸ The *Second R&O* eased slightly the Commission's anti-collusion rules for AM stations but explicitly declined to ease the rules for FM and TV.⁹ As the *Second R&O* states: "Given the limited number of opportunities for any new stations using AM frequencies, this expansion to the groups that qualify for settlement is incremental."¹⁰ The lack of opportunities and incentives for settlement provide little, if any, protection to applicants for NCE stations when faced with mutually exclusive commercial applications.

The Commission also offers NCE applicants the promise of somewhat expanded opportunities to reserve channels for NCE service.¹¹ While such expanded opportunities to reserve additional channels for NCE services is a positive step, unfortunately, this alternative is under-inclusive, because the new standards apply only (1) at the allocation stage of licensing

⁷ *Second NPRM* at ¶ 13.

⁸ 47 C.F.R. §§ 1.2105(c) and 73.5002.

⁹ *Second R&O* at ¶ 26 and n.67.

¹⁰ *Id.* at ¶ 26.

¹¹ *See id.* at ¶¶ 23, 27–42.

proceedings and (2) for vacant allotments under exceedingly narrow circumstances.¹² And once two NCE services exist in a given area, the opportunities for an applicant for an NCE station for non-reserved spectrum can be eliminated altogether.¹³ Because the opportunities to petition for reservation of a new or vacant allotment for NCE use are limited, they fail to mitigate the strict and dismissive global treatment of NCE applications, which is to automatically disqualify such applications for non-reserved spectrum when mutually exclusive with a commercial applicant.

In sum, the three mitigating factors that the Commission offers do not serve to mitigate the harshness of the Commission's decision as it relates to NCE broadcasting. Chairman Powell recently noted that he "take[s] pride in the fact that our decisions rest on an extraordinarily strong empirical record."¹⁴ Clearly, the *Second R&O* falls short of this admirable standard as there is no empirical support for the rule it adopts. The public interest in NCE broadcasting deserves greater protection than the Commission's decision provides.

II. THE COMMISSION SHOULD CLARIFY ITS *SECOND R&O* BY ADDRESSING THE SUBJECT OF INTERIM LICENSING

As the Commission failed to address how its new policy would affect interim licensing, the University requests that the Commission clarify the *Second R&O* by addressing it now. In so doing, the Commission should preserve the important role of non-profit, noncommercial educational broadcasting in returning service to the public, on an interim basis, on a vacated channel. The University also submits that to the extent the Commission felt constrained by

¹² See *id.* at ¶ 39 ("for FM channels for which we initiated an allocation proceeding . . . before the effective date of these standards . . . and for which we never opened a filing window to accept applications").

¹³ See *id.* at ¶¶ 33–34.

¹⁴ *Written Statement of Michael K. Powell Before the Committee on Commerce, Science, and Transportation, United States Senate*, June 4, 2003.

National Public Radio v. FCC, 254 F.3d 226 (D.C. Cir. 2001), that decision is not applicable to and in no way limits the Commission's power in regard to interim licensing.¹⁵

In recognition of the valuable role that interim operators play in restoring service to the public, interim operations have given rise to different regulatory treatment.¹⁶ For example, the Commission's policy historically has been "to view the interim operator as a caretaker until a regular operator is selected," and the interim operator therefore must operate on a non-profit basis.¹⁷ That the Commission relaxed this policy for the purposes of interim applications for the former Rice stations¹⁸ does not render insubstantial the differences between interim and permanent operators, specifically the importance of interim operators to quickly restore service in the public interest while the appropriate permanent use of the channel is under consideration. For example, during the Commission's former system of comparative hearings, the Review Board recognized that "[i]t makes no sense to hold the same type of time-consuming hearing to select an interim operator," because "time is of the essence" to return service to the public.¹⁹

¹⁵ See *Newark Radio Broadcasting Association v. FCC*, 763 F.2d 450, 454 (D.C. Cir. 1985) (noting that courts "have allowed, where warranted, a reduction in the procedural panoply in instances of interim applications").

¹⁶ See, e.g., *id.*

¹⁷ Public Notice, "Permanent and Interim Application Procedures Announced for Authority to Operate Stations Formerly Licensed to Entities Controlled by Michael Rice," DA 01-1441 (released July 3, 2001) citing *Angeles Broadcasting Network*, 54 RR 2d 915 (1983) at ¶ 5.

¹⁸ See Public Notice, "Permanent and Interim Application Procedures Announced for Authority to Operate Stations Formerly Licensed to Entities Controlled by Michael Rice," DA 01-1441 (released July 3, 2001).

¹⁹ *Angeles Broadcasting Network*, 96 FCC 2d 5 (Rev. Bd. 1984) at ¶ 7.

Interim licensing opportunities emerge frequently enough to merit a thoughtful approach from the Commission.²⁰

Given the *Second Report and Order*'s dismissive treatment of applications for permanent licenses, and its lack of guidance on interim licensing, the University, which has applied to operate an NCE station on the facilities formerly occupied by KFMZ, is in danger of being completely shut out of any opportunity to meaningfully compete for an interim or permanent license. It historically has been the Commission's policy to treat interim operators as "caretaker[s]" to operate vacated frequencies on a temporary and non-profit basis, and so it is quite striking that an application such as that from the University might be deemed ineligible (in favor of commercial applicants) from competing for an interim or permanent license. This sudden shift in policy would deprive the public of the valuable services of NCE stations. For these reasons, the *Second R&O* merits clarification on the important role of noncommercial educational services in restoring service to the public on an interim basis on a vacated channel.

III. THE FORMER RICE STATION SITUATION PRESENTS UNIQUE CIRCUMSTANCES DEMANDING SPECIAL PROCEDURES LIMITED TO THE FACTS OF THE CASE

The Commission should expressly recognize that the proceeding to license a new operator for the former Rice station, formerly KFMZ(FM), 98.3 MHz (Channel 252C2), Columbia, Missouri, presents a special case. Accordingly, as a matter both of equity and of the Commission's inherent power to act in the public interest, the Commission should grant a license for the former Rice station under a *sui generis* procedure that does not exclude NCE applicants—a procedure distinct from those that may apply in typical Commission licensing procedures. In

²⁰ See *Consolidated Nine v. FCC*, 403 F.2d 585, 589 (D.C. Cir. 1968) (noting that "[g]rants of interim broadcast authority, while not frequent, are not novel matters for review in this court").

this way, the Commission will be able to act expeditiously to return service on the former Rice station in a way that best serves the public interest. The University notes that nothing in the *NPR* decision prevents the Commission from licensing the former Rice station through a separate process.

In the *Second R&O*, the Commission rightly afforded NCEs the opportunity to reserve vacant allotments, but wrongly denied this opportunity to the University of Missouri with regard to the former Rice station. In order for an entity to utilize the relaxed reservation standard for vacant allotments, the allocation proceeding must: (1) have been initiated before August 7, 2000 and (2) not have had a filing window opened for it by the Commission.²¹ Application of these two requirements to the former Rice station is improper. The Commission could not have initiated an allocation proceeding prior to August 7, 2000 due to the pending litigation surrounding the Rice station licenses. In any event, the filing window for the Rice station licenses was not opened until July 16, 2001, twelve days after the D.C. Circuit issued its decision in *NPR*.²² Furthermore, the Commission's statement, "[w]e offered these groups an opportunity to settle,"²³ is false in the case of the former Rice stations.²⁴ The University should not be punished for circumstances beyond its control.

In the University's case, the equities militate that it be allowed to compete for interim authority as it has a longstanding interim application in place for the former Rice station's frequency. The University must be allowed to demonstrate the public interest in operating the

²¹ *Second R&O* at ¶ 39.

²² See Public Notice, "Permanent and Interim Application Procedures Announced for Authority to Operate Stations Formerly Licensed to Entities Controlled by Michael Rice," DA 01-1441 (released July 3, 2001).

²³ *Second R&O* at ¶ 41.

²⁴ Public Notice, "Window Opened to Permit Settlements for Closed Groups of Mutually Exclusive Broadcast Applications," 16 FCC Rcd 17091 (2001).

former KFMZ as an NCE station on a non-reserved channel and must be allowed to compete for an interim or permanent license for the former Rice station. Given the serious allegations raised about the fitness of most other applicants for interim authority to operate the former Rice station,²⁵ it is not unreasonable to expect that the Commission will spend many months, if not years, on pleadings and hearings before ultimately granting a permanent license.²⁶ Recognizing the serious loss of service created by so lengthy a process, it would serve the public interest in returning service to the community for the Commission to establish a special process applicable only to the unprecedented situation presented by the former Rice station.

Moreover, under auction procedures, litigation appears likely to keep the former Rice station's frequency silent for even longer than under the normal process. One of the entities either associated with or including Michael Rice could make the highest bid, leading to years of litigation as these relationships allow others to challenge the high bidder's character qualifications. Petitions to deny would likely ensue, and the Commission, having rebuffed Mr. Rice's previous attempts to maintain his licenses, would conceivably grant the petition to deny, which would then lead to a court appeal. While the court appeal is pending, the Commission would then be obliged to hold another auction, excluding any party found "unfit" following the first auction. But the winning party from the first auction is likely to challenge the grant arising from the second auction. This scenario, and all the permutations that an auction proceeding here might create, represent a blueprint for long-term litigation and continued loss of service.

²⁵ For example, pleadings filed with the Commission allege that two of the applicants have maintained close ties to or include Michael Rice, that one application poses potential multiple ownership and market concentration concerns, while another applicant has been accused of falsely representing the availability of antenna facilities.

²⁶ Judicial review of the *Second R&O* will cause further delay.

To prevent such prolonged loss of service to the Columbia community, the Commission should instead effectuate a special approach so that it can expeditiously select an interim and permanent licensee through a *sui generis* process. The University should be permitted to participate notwithstanding its NCE status. Given the unprecedented situation presented by the need to restore service on the former Rice station's frequency, the Commission should proceed to put this *sui generis* procedure in place under its inherent public interest and equity powers.

CONCLUSION

For the preceding reasons, the Commission should reexamine and revise its *Second R&O* so that NCE applicants will be able to effectively compete with commercial applicants for permanent licenses for channels in the non-reserved spectrum. Furthermore, the Commission should fulfill the mission of this proceeding and recognize the fundamental role that interim NCE operators serve in returning service to a vacated channel on any portion of the spectrum, reserved and non-reserved alike. At a minimum, the Commission should establish a *sui generis* process to resolve the myriad issues in the case of the former Rice stations.

Respectfully submitted,

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By: /s/ Kathryn R. Schmeltzer

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of June 2003, a true and correct copy of the foregoing PETITION FOR RECONSIDERATION OF THE CURATORS OF THE UNIVERSITY OF MISSOURI was sent by postage prepaid, first-class mail, unless otherwise indicated, to the following:

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